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IN THE

SUPREME COURT OF THE UNITED STATES

1948 TERM

WILLIAM HASKELL BROWN, PETITIONER,

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS; AND THE UNITED STATES OF AMERICA, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS; AND THE UNITED STATES OF AMERICA, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, William Haskell Brown, once a soldier in the United States Air Corps, now a prisoner at the United States Penitentiary, Leavenworth, Kansas, as a result of Army court-martial conviction and sentence, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit (set out herein, Appendix) affirming the judgment of the District Court for the District of Kansas discharging a writ of habeas corpus and remanding petitioner to the custody of the Respondent Warden.

OPINION BELOW.

The opinion of the Court of Appeals not yet reported, is set out in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered the 26th day of January, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether a "recommendation of clemency" executed and signed individually by all the members of a general court-martial following the action of the Court in finding petitioner guilty and sentencing him to imprisonment for life in which recommendation each member of the Court stated over his signature that the sentence imposed "is too severe under all the facts and circumstances and is not warranted by the record", amounts to an acquittal of the charge.

2. Whether under the circumstances stated above and in view of the provisions of Article of War No. 43 (10 U. S. C. 1514) the general court-martial convicted itself of fraudulent action and petitioner was denied due process and a fair trial.

3. Interpretation of Federal Statutes, Article of War 43 (10 U. S. C. 1514) and Article of War 92 (10 U. S. C. 1564). Does AW 92 nullify AW 43 so that upon a finding of guilty under AW 92 the court-martial has mandatory duty to impose life imprisonment.

4. Conflict between the judgment of the Court of Appeals and the judgment of the Supreme Court in *Andres v. United States*, 333 U. S. 740, 90 L. ed. 790.

STATUTES INVOLVED.

The 43rd Article of War (10 U. S. C. 1514) provides:

> "No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote."

STATEMENT OF THE CASE.

Petitioner's habeas corpus case was submitted to the District Court on the pleadings and a copy of the recommendation of clemency and the last four pages of the general court-martial trial record which describe the action of the court-martial in finding petitioner guilty and imposing sentence. In connection with the sentence, the court-martial record recites, "The Court announces a recommendation for clemency will be submitted." (T. 17, 18.)

Petitioner, while on active duty with the air force at Salinas Air Base, California, in 1943 was convicted by

general court-martial of rape in violation of the 92nd Article of War (10 U. S. C. 1564). The sentence included dishonorable discharge, forfeiture of pay, and imprisonment for life (R. 6-7, 17). Sentence was imposed late at night, August 5, 1943, and the President of the Court-martial stated that the Court would submit a recommendation for clemency (R. 17, 18). The Court met the following morning, August 6, 1943, and prepared a letter recommending clemency and it was signed by all of the members of the court-martial. This letter is set out in part in the opinion of the Court of Appeals, (Appendix herein) and in the Transcript pages 19-20.

REASONS FOR GRANTING THE WRIT.

Important questions of federal statutory interpretation are presented by this case. Article of War 43 (10 U. S. C. 1514) requires an affirmative vote of two-thirds of the membership of the Court for finding of guilty; and a separate and distinct affirmative vote of three-fourths of the members for a sentence to life imprisonment. The Manual for Courts-Martial provides that these votes are separate and distinct actions. The Court is closed and votes upon guilt or innocence. Upon a finding of guilt the Court opens and hears any matters relative to prior criminal record. The Court then goes into closed session and votes upon the sentence. (Manual for Courts-Martial, U. S. Army 1928, paragraphs 50, 78.) It is obvious from the wording of the recommendation of clemency in this case that members of the Court felt that they were required to vote life imprisonment.

The Court of Appeals held that "the mandatory provisions of Article of War 92 imposed a compulsory duty upon the board to sentence the petitioner to death or life imprisonment upon a finding of guilt. Under this ruling Article of War 43 is nullified.

A further question of importance involved in the case is a conflict between the decision of the Court of Appeals in this case and the decision of the Supreme Court in *Andres v. United States,* 333 U. S. 740, 92 L. ed. 790, where the Court interpreted the federal criminal statute fixing the penalty for murder in the first degree, 18 U. S. C. 567, which authorizes a jury to add to its verdict "without capital punishment". The Court interpreted that statute as requiring unanimity both as to guilt and punishment before a verdict could be rendered.

Integrity of the law is involved here. How can this conviction stand when the men responsible for it have over their handwritten signatures said that a distinct and essential part of their action was not warranted by the record? Nothing more is needed to establish the fraudulent action of the Court and the denial of the fairness guaranteed this petitioner by the Sixth Amendment. This admission by members of the Court established beyond dispute that they ignored or misunderstood the requirements of Article of War 43 and a denial of due process guaranteed by the Fifth Amendment resulted therefrom.

SUPPORTING BRIEF.

Stout v. Hancock, 146 F. 2d 741, and *United States v. Garvin*, 71 F. Supp. 454, (affirmed 165 F. 2d 213), both say that under AW 43 (10 U. S. C. 1514) the vote upon guilt and upon sentence are separate and distinct steps. The *Stout v. Hancock* case contains dicta that the Court has no discretion where guilt has been voted under AW 92 but to vote death or life imprisonment, and the Tenth Circuit so held in this case.

Petitioner respectfully contradicts that view of the law, and contends that if three-fourths of the members honestly feel that life imprisonment "is not warranted by the record" they have the duty to give consideration to some lesser offense or to acquit the accused. The requirement of a larger percent of vote to impose life imprisonment than required to find guilt was not inserted as a casual, chance act of the Congress. It was inserted for the protection of the accused against the vagaries and perils of an Army Court-martial. Any doubt of this will quickly vanish by a brief study of the 1920 Congressional Record covering the enactment of the Articles of War.

Because of the injustices during the World War, Congress by Herculean effort attempted to enact Articles that would afford some protection to the accused. A score of bills were introduced and the Congressional Records, Journals and Reports contain hundreds of pages of debate, hearings and reports. Committees were appointed by the American Bar Association, the Secretary of War and by the War Department. (See explanation

by Senator Chamberlain, Cong. Record, Vol. 59, Part 6, pages 5843, 44.) The report of the American Bar Association was not published, but was discussed. (Proc. Am. Bar, Vol. 44, pages 44, 70, 84.)

Report of hearings on one of the bills (S. B. 64) contains 1395 pages. (See Hearings before a Subcommittee of the Committee on Military Affairs United States Senate, 66th Congress, First Session, on S. B. 64—A Bill to establish military justice.)

No court would hesitate a minute to void this conviction if the recommendation had related to the finding of guilty rather than to the sentence. In other words, if the court members had said "We have found him guilty but our finding is not warranted by the record."

Therefore, since the sentence requires a larger percent of votes than does a finding of guilt, and is a separate and distinct act incident to a finding of guilt and sentence, the special finding of the court that the sentence voted "is not warranted by the record" operates to void the action of the court-martial.

Conviction and sentence are separate and distinct steps. *Stout v. Hancock,* 146 F. 2d 74. The vote for life imprisonment which all members of the court believed "not warranted by the record" constituted failure to agree on sentence. And under the ruling of the Supreme Court in *Andres v. United States,* 333 U. S. 740, 92 L. Ed. 790, *there could be no conviction until the required number agreed both on guilt and sentence.* (And see Manual for Courts-Martial, paragraph 78.) Also, in the *Andres* case, the Court said that in capital cases

doubts as to statutory construction should be resolved in favor of the accused.

Clemency recommendation amounted to a special finding inconsistent with the general finding on guilt and sentence.

The clemency recommendation was by the Court itself. It is perfectly obvious, we believe, that during the secret sessions and vote upon guilt and upon sentence the decision to make a clemency recommendation was of controlling significance and turned the balance against the accused. In conjunction with the pronouncement of sentence the court-martial record recites that the Court stated:

> "The Court announces a recommendation for clemency will be submitted." (See Court of Appeals Opinion, Appendix.)

The Court concluded its action and responsibility in the case by making the recommendation, and stated over the signature of each of the seven members that the sentence "is not warranted by the record."

Petitioner submits that under the circumstances this constituted a special finding, and as such it would prevail.

> 23 CJS p. 1080.
> 80 ALR 171, and cases cited therein.

In *Smith v. United States*, 47 F. 2d 518, it was said:

> "Unanimity in a verdict, unless otherwise provided by statute, is one of the incidents and essentials of a jury trial. In a criminal case, this unanimity extends to the question of guilt or innocence,

to the degree of the crime, where the offense is divided into different degrees, and to the kind or character of punishment, where that question is left to the determination of the jury." (p. 520.)

There was denial of Due Process.

We have demonstrated, we believe, that there was no valid action of the court-martial in relation to sentence.

It follows that this petitioner was denied due process of law.

Van Mehran v. Sirmyer, 36 F. 2d 876;
Runkle v. United States, 122 U. S. 543, 555, 30 L. ed. 1167;
Hicks v. Hiatt, 64 Fed. Supp. 238.

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APPENDIX.

United States Circuit Court of Appeals

TENTH CIRCUIT

No. 3761—NOVEMBER TERM, 1948.

William H. Brown, Appellant,

v.

Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas; and The United States of America, Appellee.

Appeal from the United States District Court for the District of Kansas.

[Filed January 26, 1949.]

Howard F. McCue for appellant.

Nicholas R. Voorhis, Lt. Col., JAGD (Lester Luther, United States Attorney, and Eugene W. Davis, Asst. United States Attorney, were with him on the brief) for appellee.

Before PHILLIPS, Chief Judge, and BRATTON and HUXMAN, Circuit Judges.

PHILLIPS, Chief Judge, delivered the opinion of the court.

This is an appeal from a discharge of a writ of habeas corpus.

Brown, the petitioner, was convicted by a general courts-martial board for rape in violation of Article of

War 92.[1] The sentence, as announced by the president of the board, was as follows:

> "Upon closed session of the Court, three-fourths of all members present at the time the vote was taken concurring, sentences you to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of your natural life."

At the time of the pronouncement, the board made the following statement: "The Court announces a recommendation for clemency will be submitted."

Subsequently, the members of the board sent a communication entitled "Recommendation of Clemency" to the Commanding General of the Fourth Air Force, which, in part, was as follows:

> "By virtue of the premises, the court is of the opinion that the minimum mandatory sentence permitted in this case by the Manual for Courts Martial, which the court pursuant thereto rendered, is too severe under all the facts and circumstances and is not warranted by the record.
>
> "3. Four members of the Court are of the opinion that confinement at hard labor for a period of ten years, and the other three members of the Court are of the opinion that confinement at hard labor for a period of five years, will work substantial justice in this case and would be a more appropriate sentence.
>
> "4. Accordingly, the Court recommends clemency for the accused. It is therefore recommended by the Court that the period of confinement at hard labor be reduced to a term of either ten or five years, as the reviewing authority may determine to be proper and just in the premises."

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[1] 10 U. S. C. A. 1564, which provides, in part: "Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct. *** ."

In accordance with Article of War 50-½[2] the sentence was reviewed by a board of review, which board approved the sentence but reduced the period of confinement to ten years upon the recommendation of the Judge Advocate General. Petitioner's sentence was subsequently twice reduced to 8 years and 7 years' confinement by order of the President.

While confined in the United States Penitentiary at Fort Leavenworth, Kansas, petitioner, on May 27, 1948, by habeas corpus, sought release on the ground that the sentence and conviction were void. The trial court denied the petition and this appeal followed.

Article of War 43[3] provides:

> "No person shall, by general court-martial, be convicted *** for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all the members present at the time the vote is taken."

Petitioner contends that since it was necessary for three-fourths of the members of the board to concur for a valid sentence of life imprisonment, the board's statement, in its recommendation for clemency, that the sentence was not warranted by the record, shows that the requisite number of members did not concur in the sentence.

Paragraph 81, Manual for Courts-Martial,[4] in part, provides:

> "When a court-martial has sentenced an accused, the court will at once announce the findings and sentence in open court, ***.

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[2] 10 U. S. C. A. 1522.

[3] 10 U. S. C. A. 1514.

[4] The Manual for Courts-Martial is published by Presidential Order (Exec. Orders, No. 4773, November 29, 1927; No. 8727, April 1, 1941; No. 9048, February 3, 1942; No. 9216, August 7, 1942; No. 9267, November 9, 1942; No. 9324, March 31, 1943) under statutory authority of Article of War 38. (10 U. S. C. A. 1509.)

"After such announcement ***, the defense may submit in writing for attachment to the record any matters as to clemency which it desires to have considered by the members of the court or the reviewing authority. The rules of evidence are not applicable to such matters.

"One or more recommendations to clemency, each signed by the members joining therein, may be submitted to the trial judge advocate for forwarding with the record. Such recommendation may include a recommendation for the suspension of all or part of the sentence, including a sentence of dishonorable discharge. It should be specific as to amount and character of clemency recommended and as to the reasons for the recommendation."

Petitioner's contention is unsound. The recommendation of clemency was no part of the findings or the sentence of the board. It did not become part of the record submitted to the appellate authority but was merely forwarded with the record. In nowise could it affect the authority of the sentence but was directed solely to the power of the appellate authority to mitigate or remit the sentence under Article of War 50.[5]

The mandatory provisions of Article of War 92 imposed a compulsory duty upon the board to sentence petitioner to death or life imprisonment upon a finding of guilt. It had no alternative but to comply with the legislative direction. It could, however, in the event of pal-

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[5] 10 U. S. C. A. 1521, which provides, in part:

"The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence. ***

"When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division, may approve or conform and commute (but not approve or confirm without commuting), mitigate, or remit, and then order executed as commuted, mitigated, or remitted any sentence which under these articles requires the confirmation of the President before the same may be executed. *** "

liating circumstances, recommend clemency through the channels provided for such a procedure.

We conclude the detention is lawful.

AFFIRMED.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Tenth Circuit.